

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIELLE F. JENKINS and DEPARTMENT OF THE AIR FORCE,
NEWARK AIR FORCE BASE, OH

*Docket No. 02-1793; Submitted on the Record;
Issued January 14, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established an employment-related disability commencing March 31, 1993; and (2) whether the Office of Workers' Compensation Programs properly terminated medical benefits as of December 12, 1997.

On September 27, 1987 appellant, then a management assistant, filed a notice of occupational disease and claim for compensation, alleging that her poliomyelitis had been aggravated by her federal employment. She indicated that in September 1984 a job reassignment had required her to walk up a flight of stairs several times a day. On April 8, 1988 the Office accepted the claim for aggravation of preexisting poliomyelitis. By letter dated December 23, 1991, the Office advised appellant that it had accepted a permanent aggravation of poliomyelitis.

On March 31, 1993 appellant stopped working and retired from federal employment. She filed a claim for compensation (Form CA-7) as of March 31, 1993.

By decision dated March 31, 1994, the Office denied the claim for compensation commencing March 31, 1993. In a decision dated July 13, 1995, an Office hearing representative set aside the decision and remanded the case for further development. The hearing representative found that the report of the second opinion referral physician, Dr. Lowell Quenemoen, was insufficient to resolve the issue presented.

In a decision dated November 21, 1995, the Office again denied the claim for compensation as of March 31, 1993. By decision dated July 26, 1996, an Office hearing representative set aside the November 21, 1995 decision and remanded the case for further development. The hearing representative found that the second opinion referral osteopath, Dr. Robert Mazo, did not resolve the issue presented.

By decision dated October 2, 1996, the Office denied the claim for compensation. In a decision dated August 18, 1997, an Office hearing representative set aside the October 2, 1996 decision and remanded the case for further development. The hearing representative determined

that the report of the second opinion neurologist, Dr. Gerald Steiman, was insufficient to resolve the issue presented.

In a decision dated December 12, 1997, the Office denied the claim for wage-loss compensation on or after March 31, 1993. The Office also terminated authorization for medical benefits. By decision dated September 11, 1998, an Office hearing representative affirmed the December 12, 1997 decision. By decisions dated December 8, 1999, February 27, 2001 and March 26, 2002, the Office denied modification.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

In this case, the Office found that the weight of the evidence was represented by an October 28, 1997 report from a second opinion neurologist, Dr. Michael Somple. He provided a history and results on examination, diagnosing post polio syndrome. Dr. Somple opined that appellant did not have a continuing employment-related aggravation, noting that post polio syndrome is a progressive condition and appellant's current condition would have developed regardless of the employment activity. With respect to disability for work, Dr. Somple opined that appellant was not disabled on or after March 31, 1993.

On the other hand, appellant submitted probative medical evidence providing a contrary opinion with respect to the extent of the employment-related aggravation and disability for work. In a report dated October 5, 1999, Dr. Robert Taylor, a neurologist, provided a history and indicated that he reviewed appellant's medical records. Dr. Taylor stated that he disagreed with Dr. Somple's opinion. According to Dr. Taylor, any progression in post polio syndrome that occurs due to excessive physical activity would be irreversible and cumulative. He concluded that the work situation from 1984 to 1985 had caused a permanent exacerbation of appellant's condition and disability for work. In a report dated March 28, 2000, Dr. Taylor further explained his opinion, stating that excessive use of affected muscles can stress the anterior horn cells to the point of causing their destruction and resulting in a permanent progression of post polio syndrome.

The record also contains several reports from Dr. Ernest Johnson, an attending specialist in physical medicine and rehabilitation. In a report dated August 25, 1993, he indicated that appellant was permanently disabled for work. In a report dated August 24, 1998, Dr. Johnson opined that appellant's disability as of March 31, 1993 was causally related to the work assignment stair climbing activity from September 1984 to October 1985. He concluded that appellant had permanent residuals from the aggravation of her polio condition.

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹ When there are opposing medical reports of virtually equal weight and

¹ *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.²

In this case, the record contains a conflict on both issues presented: (1) whether there was an employment-related disability for work on or after March 31, 1993, and (2) the duration of the employment-related aggravation. The case will be remanded to the Office to secure a medical opinion from an impartial medical specialist.³ After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated March 26, 2002 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
January 14, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

² *William C. Bush*, 40 ECAB 1064 (1989).

³ With respect to the accepted condition in the case, a 1991 Office letter accepted a permanent aggravation and yet in the extensive subsequent development of the case the accepted condition was reported as an aggravation, not a permanent aggravation. It is the Office's burden of proof to rescind acceptance or terminate medical benefits; *see Roberto Rodriguez*, 50 ECAB 124 (1998). Since the record is in conflict as to the duration of the aggravation, a reasoned opinion from the impartial specialist as to whether the aggravation was temporary or permanent will resolve the issue and the Office should make appropriate findings.